

the number of consumers that have been misled, or otherwise purchased a Power Products dental protector when they intended to purchase a NIGHTGUARD brand dental protector.

Moreover, and more importantly, Medtech's reputation among customers and potential customers could be severely damaged—an injury that is incapable of being fully remedied by monetary damages. *See Towers Financial Corp. v. Dun & Bradstreet, Inc.*, 803 F. Supp. 820, 822-23 (S.D.N.Y. 1992). Power Products, by continuing to sell its prescription only device OTC, invites FDA regulatory action as a consequence of its offering products that are “adulterated” or “misbranded” under the Federal Food Drug & Cosmetic Act. By wrongfully adopting the NIGHTGUARD trademark, Power Products creates the likelihood of consumer confusion as to the party and products which may be subject to any further regulatory action.

#### IV. CONCLUSION

Based on the foregoing, Medtech respectfully requests that the Court grant Medtech's Motion and enjoin Power Products from (i) using the NIGHTGUARD mark on any products or materials, (ii) copying or distributing any of Medtech's copyrighted materials, and (iii) selling its dental protector OTC until such time as those sales are approved by the FDA.

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Respectfully submitted,

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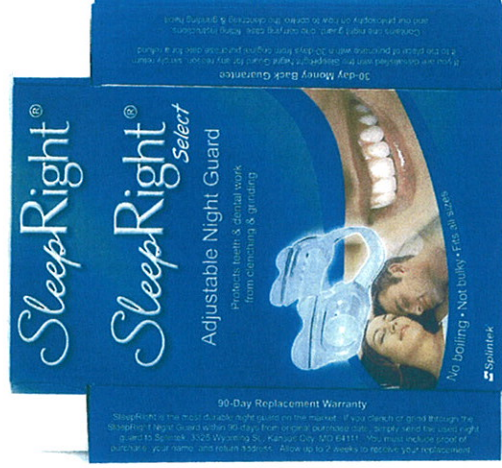
## V. APPENDIX

### A. MEDTECH'S NIGHTGUARD PACKAGING



Schrank Decl. ¶ 4 & Exs. A & B.





### B. SPLINTEK'S PACKAGING



Schrank Decl. ¶ 11 & Ex. G.



C. EXAMPLES OF POWER PRODUCTS “COMMUNITY MODERATORS” USING MEDTECH’S NIGHTGUARD MARK.

<b>RachelM</b> Community Moderator  Joined: 25 Sep 2006 Posts: 26	<p>Posted: Thu Nov 30, 2006 11:26 am Post subject:</p> <p>You can clean the Nightguard as often as you'd like. As long as you use cool water when rinsing and cleaning. Also to avoid any mold build-up make sure the Nightguard is completely dry before putting it back in its case. 😊</p> <p> quote</p>
<b>RachelM</b> Community Moderator  Joined: 25 Sep 2006 Posts: 26	<p>Posted: Mon Dec 11, 2006 11:14 am Post subject:</p> <p>I believe the reason that you are finding the Nightguard so uncomfortable is because you purchased the wrong size Nightguard. We do have a Low-Profile Nightguard available that we recommend for people with sensitive gums or small mouths. The Low-Profile doesn't have the stability wings which is what seems to be bothering you. Also, you shouldn't have a problem closing your mouth with the Low-Profile. The SleepRight Nightguard does not cause your gums to recede. If you'd like you can exchange your Nightguard for the Low-Profile, as long as your still within your 90-day replacement period. 😊</p> <p> quote</p>
<b>StevenF</b> Community Moderator  Joined: 28 Aug 2006 Posts: 4	<p>Posted: Thu Dec 21, 2006 9:22 am Post subject:</p> <p>Your Nightguard may be a little too large for your mouth. You should consider exchanging it for the Low-Profile. 😊</p> <p> quote</p>
<b>RachelM</b> Community Moderator  Joined: 25 Sep 2006 Posts: 26	<p>Posted: Mon Oct 23, 2006 10:13 am Post subject:</p> <p>Yes! the Nightguard will fit even though you've had some teeth pulled, just one of the great benefits from the adjustable side wings on the Nightguard. Also, you shouldn't feel any discomfort from the Nightguard. On the contrary, it is very comfortable and will protect any dental work you plan on having done. 😊</p> <p> quote</p>

Manning Decl. ¶ 4, Ex. 3.








**D. COMPARISON OF WARNINGS.**


<p><b>THE DOCTOR'S® NIGHTGUARD AT-HOME FITTING INSTRUCTIONS</b></p>	<p><b>SPLINTEK WARNINGS (FROM WWW.SLEEPRIGHT.COM)</b></p>
<p>Do not use:</p> <ul style="list-style-type: none"> <li>• If you are under 18 years of age.</li> <li>• If you wear braces, dentures, or other dental products.</li> <li>• If you can wiggle any of your teeth.</li> <li>• If your dentist has told you that you have TMJ.</li> <li>• If you have any tooth or jaw pain or pain with bruxing or tooth grinding.</li> <li>• As an athletic mouth guard. Product does not absorb shock.</li> <li>• For more than three months without consulting your dentist.</li> </ul> <p>Ask a Dentist Before Use if You Have:</p> <ul style="list-style-type: none"> <li>• Loose fillings, loose caps or cavities with no fillings.</li> <li>• Clicking of your jaw.</li> <li>• Jaw pain, teeth pain, face pain, or have a hard time chewing.</li> <li>• Two or more missing teeth.</li> <li>• Mouth sores.</li> <li>• Gum disease or bleeding gums.</li> <li>• Serious breathing, respiratory or other health problems.</li> </ul> <p>When Using This Product:</p> <ul style="list-style-type: none"> <li>• See your dentist every six months.</li> </ul> <p>Stop Use and Ask a Dentist if:</p> <ul style="list-style-type: none"> <li>• Your same symptoms last even after several weeks of use.</li> <li>• The product easily falls out of your mouth.</li> <li>• The product causes you to gag or feels uncomfortable.</li> <li>• You have bleeding gums, soreness, or other reaction inside your mouth.</li> <li>• You notice new symptoms (jaw pain, teeth pain, ear pain, headache, neck stiffness, or joint clicking) because of the product.</li> <li>• You have loose teeth or a change in your bite that lasts more than a few minutes after taking product out.</li> </ul>	<p><b>Do not use</b> if you are under 18 years of age. If you can wiggle any of your teeth. If your dentist told you that you have TMJ. If you have any tooth or jaw pain, or pain with bruxing or tooth grinding. As an athletic mouth guard. For more than 12 hours in a 24 hour period. For more than three months without consulting your dentist. Discontinue use and replace if breakage occurs. <b>Ask a doctor before use if you have</b> loose fillings, loose caps or cavities with no fillings. Clicking of your jaw. Jaw pain, teeth pain, face pain, or have a hard time chewing. Two or more missing teeth. Mouth sores. Gum disease or bleeding gums. Serious breathing, respiratory or other health problems.</p> <p><b>When using this product</b> see your dentist every six months. <b>Stop use and ask a dentist if</b> your same symptoms last even after several weeks of use. The product easily falls out of your mouth. The product causes you to gag or feels uncomfortable. You have bleeding gums, soreness, or other reaction inside your mouth. You notice new symptoms (jaw pain, teeth pain, ear pain, headache, neck stiffness, or joint clicking) because of the product. You have loose teeth or a change in your bite that lasts more than a few minutes after taking product out.</p>



Schrank Decl. ¶ 6 & Ex. C and Manning Decl. ¶ 6 & Ex. 6.

**E. EXAMPLES OF COMMUNITY POSTINGS REGARDING THE QUALITY OF THE POWER PRODUCTS' DENTAL PROTECTOR.**

<b>t1218</b> Guest	<p>Posted: Sat Dec 09, 2006 11:03 pm Post subject: Sleepright is Terrible!</p> <p>I can't believe that they can sell the Sleepright! It is so bulky that I cannot close my lips--they are about 1" apart. Very uncomfortable. The appliance also stays on by being wrapped up and over your gums. Your gums are not meant to have anything rub on them like this. Can this cause the gums to recede? ?</p> <p></p>
<b>skhouse</b> Guest	<p>Posted: Fri Jun 09, 2006 4:39 pm Post subject: Keeping the strap down</p> <p>Am I wearing this wrong because I can't seem to fit the strap correctly? It keeps riding up and/or feels like it is not long enough to go along the bottom of my lower teeth as in the picture. Is there some trick? Is it just by moving the bitewings that will make it work? thanks in advance</p> <p></p>
<b>Boo</b> Guest	<p>Posted: Wed Jul 12, 2006 7:17 pm Post subject: Do not waste your money</p> <p>I am completely unsatisfied with this product. It caused me more pain than I was experiencing before purchasing the product. My mouth is small and even after making adjustments the product fit poorly. I returned the product but I did not receive my money back!</p> <p></p>
<b>Guest</b> Guest	<p>Posted: Wed Sep 06, 2006 12:04 pm Post subject: Ripp-off</p> <p> this product is a rip off. It is a gimmick and it should be sold on the home shopping network. Do not waste your time buying a \$80-\$100 dollar pice of plastic to put in your mouth.</p> <p></p>
<b>Guest</b>	<p>Posted: Fri Mar 09, 2007 10:22 pm Post subject: SleepRight is dangerous!!!</p> <p> I bought this product and it broke on the third night! I woke up to find it in</p> <p></p>

	<p>three pieces in my mouth (2 of which were small!). Not only am I mad about wasting my money on this product, I can't understand why it is still on the market!!! It doesn't say anywhere on the product/box,etc. that this is a choking hazard! I am surprised nobody has choked to death in their sleep. After researching this product, I have found that MANY people have the same complaint! Don't buy this product!!</p>	
<p><b>bromero</b> Guest</p>	<p>Posted: Mon May 07, 2007 4:12 pm      Post subject: swollen cheeks</p>	<p> <b>quote</b></p>
	<p>I sometimes have my cheeks on the inside get very red and swollen , Could I be allergic to the material??? get</p>	

Manning Decl. ¶ 4 & Ex. 4.